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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/598,908	07/25/2007	Sylvie Tournade	3712036.00755	1892
29157	7590	03/30/2011	EXAMINER	
K&L Gates LLP			ARIANI, KADE	
P.O. Box 1135				
CHICAGO, IL 60690				
			ART UNIT	PAPER NUMBER
			1651	
			NOTIFICATION DATE	DELIVERY MODE
			03/30/2011	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/598,908	<b>Applicant(s)</b> TOURNADE ET AL.	
	<b>Examiner</b> KADE ARIANI	<b>Art Unit</b> 1651	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 21 January 2011.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-11, 13 and 14 is/are pending in the application.
- 4a) Of the above claim(s) 8-11, 13 and 14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

***DETAILED ACTION***

The amendment filed on January 21, 2011, has been received.

Claims 1-11, 13 and 14 are pending in this application, claims 8-11, 13, and 14 are withdrawn from consideration, and claims 1-7 are examined on their merits.

Applicant's arguments with respect to claims 1-7 filed on 1/21/2011 have been considered but are moot in view of the new ground(s) of rejection.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

The rejection of claims 1-7 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention, is withdrawn.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 4-7 rejected under 35 U.S.C. 102(b) as being anticipated by Fleming et al. (Journal of Food Science 1983, Vol. 48, p.975-981).

Fleming et al. disclose a liquid product which is water-based comprises living microorganisms having a shelf-life of at least 1 month at 10 °C, during which the pH is decreasing less than 2 points and is free of carbohydrates that can be metabolized by the microorganisms, microorganisms are from genus *Lactobacillus*, and the product at 20 °C experiences a decrease in pH of less than 2 points (brined vegetables fermented with *Lactobacillus plantarum* all fermentable sugars were removed and is stable during 12 months storage at room temperature, 24 °C and at pH 3.3 or pH 3.8) (Abstract, p.978 2<sup>nd</sup> column 2<sup>nd</sup> paragraph, and p. 979 1<sup>st</sup> column "Discussion" lines 1-12), the pH of the product at the beginning of storage is 4 or higher (pH 4.5) (p.976 1<sup>st</sup> column 2<sup>nd</sup> paragraph line 10). It must be noted that *Lactobacillus plantarum* is a probiotic.

Fleming et al. therefore clearly anticipate the claimed invention.

### ***Claim Rejections – 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The rejection of claims 1-4, 6, and 7 under 35 U.S.C. 103(a) as being unpatentable over Reniero et al. (WO 00/53202) in view of Schlothauer et al. (US Patent No. 7,780,970 B2), is withdrawn.

The rejection of claims 1-7 under 35 U.S.C. 103(a) as being unpatentable over Reniero et al. (WO 00/53202) in view of Kailasapathy K. (Current Issue Intest. Microbiol., 2002, Vol.3, p.39-48) and further in view of Hottinger et al. (US Patent No. 5,382,438), is withdrawn.

Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleming et al. (Journal of Food Science 1983, Vol. 48, p.975-981) and Reniero et al. (WO 00/53202).

As mentioned immediately above, Fleming et al. teach a liquid product which is water-based comprises living microorganisms having a shelf-life of at least 1 month at 10°C, during which the pH is decreasing less than 2 points and the product is free of carbohydrates that can be metabolized by the microorganisms, microorganisms are from genus *Lactobacillus*, a probiotic, the product at 20°C experiences a decrease in pH of less than 2 points (brined vegetables fermented with *Lactobacillus plantarum* all fermentable sugars were removed and is stable during 12 months storage at room temperature, 24°C and at pH 3.3 or pH 3.8) (Abstract, p.978 2<sup>nd</sup> column 2<sup>nd</sup> paragraph,

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and p. 979 1<sup>st</sup> column "Discussion" lines 1-12), the pH of the product at the beginning of storage is 4 or higher (pH 4.5) (p.976 1<sup>st</sup> column 2<sup>nd</sup> paragraph line 10).

Fleming et al. do not teach the product comprising milk proteins, and microorganisms do not metabolize lactose. However, Reniero et al. teach a liquid product which comprises living microorganisms/, having a shelf-life of at least 1 month at 10°C, and during the 1 month at 10°C period the amount of living bacteria decreases less than 2 log-units, the microorganism is a *Lactobacillus* (a cereal drink comprising *L. casei* CNNM I-2116 or ST11 which is stored at 10°C for 30 days, and the survival rate after 30 days less than 2 log units) (page 29 of the "PDF" Figure 3.), Reniero et al. teach a *Lactobacillus*, *L. casei* CNNM I-2116, (p.23 claim 6). It must be noted that *L. casei* CNNM I-2116 or ST11 does not use (metabolize) lactose. Reniero et al. further teach milk (milk proteins) can be added to the product (p. 24 claim 14). Reniero et al. teach *L. casei* CNNM I-21 (a probiotic) is capable of utilizing carbohydrates sucrose and glucose, and further teach acidification of the medium after supplementing the growth medium of *L. casei* CNNM I-2116, with sucrose and glucose (please note that the pH of the medium drops from 6.50 to 5.50 and continues to drop to pH 4.0 when sucrose and glucose are included in the growth medium) (see page 28 of the PDF Figure 2. acidification of *L. casei* ST11 or CNNM I-2116, pH vs. fermentation time in hours).

Therefore, a person of ordinary skill in the art at the time the invention was made would have been motivated to apply the prior art teachings and not to include the carbohydrates that can be metabolized by the microorganism in the liquid product as

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taught by Reniero et al. in order to provide a liquid product which is milk-based and comprises a microorganism having a shelf-life of at least 1 month at 10°C, and during the 1 month at 10°C the amount of living bacteria decreases less than 2 log-units, which is free of carbohydrates that can be metabolized by the microorganisms. Because Reniero et al. teach the presence of carbohydrates (sucrose and glucose) that can be utilized by the *Lactobacillus*, *L. casei* CNM I-21 increases the acidification (drop in pH) of the medium, and because Fleming et al. teach removing the fermentable sugars from the liquid product comprising a microorganism makes the liquid product microbiologically stable during the storage for 12 months at room temperature/24°C, and at pH 3.3 or pH 3.8.

### ***Conclusion***

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kade Ariani whose telephone number is (571) 272-6083. The examiner can normally be reached on IFP.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (571) 272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kade Ariani/  
Primary Examiner, Art Unit 1651